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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANTHONY FIELD, ) CASE NO. SA CV 12-01086 RZ  
Plaintiff, )  
vs. )  
CAROLYN W. COLVIN, Acting )  
Commissioner of Social Security, )  
Defendant. )  
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)

If a social security claimant has an impairment that reasonably might lead to subjective symptoms, an Administrative Law Judge can reject the claimant's testimony about those symptoms only for clear and convincing reasons. *Bunnell v. Sullivan*, 947 F.2d 341 (9th Cir. 1991) (*en banc*). The primary issue on this appeal from the Commissioner's denial of disability benefits is whether the Administrative Law Judge complied with this standard.

Insofar as the subjective symptoms concerned pain, the Administrative Law Judge did meet this standard. Plaintiff asserted that he suffered pain, but does not even appeal the decision of the Administrative Law Judge that he had no severe impairment relating to his hiatal hernia, which he said causes him pain [AR 56], or to the aftermath of his three knee surgeries. [AR 25; (Plaintiff had severe impairments of obstructive sleep apnea, gastroesophageal reflux disease and obesity.)] Furthermore, the Administrative Law

1 Judge gave several valid reasons why Plaintiff's allegations as to pain were not to be  
 2 believed. Among these were (1) the thin medical evidence to support an impairment  
 3 causing pain; inconsistency with objective medical evidence can be one factor impeaching  
 4 credibility [AR 30]; *Rollins v. Massanari*, 261 F. 3d 853, 857 (9th Cir. 2001).; and (2) no  
 5 need for pain modalities. [AR 30]; *Johnson v. Shalala*, 60 F.3d 1428, 1433 (9th Cir. 1995).  
 6 He also found a residual functional capacity that limited lifting to below that normally  
 7 found in light work, and limited kneeling, crouching, stooping and crawling [AR 26], all  
 8 limitations that accounted for pain that might be associated with the hernia or joint issues.

9         But pain was not the only subjective symptom that Plaintiff asserted. In  
 10 *Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996), the Court held that fatigue was also a  
 11 subjective symptom, and an administrative law judge who disbelieved a claimant's  
 12 assertions of fatigue must comply with the *Bunnell* standard in making his determination.  
 13 Plaintiff asserted that he suffered from fatigue as a consequence of his obstructive sleep  
 14 apnea. It is reasonable to assume that such an impairment can cause fatigue, because the  
 15 physician who diagnosed the sleep apnea warned Plaintiff about things like falling asleep  
 16 while driving. [AR 443] *See Morris v. Astrue*, 323 Fed. Appx. 584, 585 (9th Cir. 2009)  
 17 (holding that fibromyalgia, sleep apnea and obesity were impairments that reasonably  
 18 could be expected to cause the pain or subjective symptoms alleged). Under *Bunnell* and  
 19 *Smolen*, therefore, the Administrative Law Judge had to give clear and convincing reasons  
 20 for rejecting Plaintiff's testimony. He also had to identify which testimony he was  
 21 rejecting. *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996)

22         The Administrative Law Judge had this to say about Plaintiff's assertion of  
 23 fatigue:

24  
 25         The claimant testified he is constantly tired and even falls asleep  
 26 in a fast food waiting line; yet the undersigned observed the  
 27 claimant was able to sit comfortably during the course of the  
 28 hearing that lasted approximately one hour, with no unusual

1 posture, no shifting of weight, and no expressed need to stand,  
2 or change position. He also betrayed no evidence of pain,  
3 discomfort, or inability to stay awake while testifying at the  
4 hearing. While the hearing was short-lived and cannot be  
5 considered a conclusive indicator of the a claimant's overall  
6 level of limitations on a day-to-day basis, the apparent lack of  
7 discomfort during the hearing is given some slight weight in  
8 reaching the conclusion regarding the credibility of the  
9 claimant's allegations and the claimant's residual functional  
10 capacity.

11  
12 [AR 30] The Administrative Law Judge's understanding that he could draw only a limited  
13 inference from the ability of Plaintiff to stay awake during the hearing, and that he could  
14 do no more than give it "slight weight," is consistent with the law holding that an  
15 administrative law judge's personal observations cannot be the basis for discrediting a  
16 claimant's testimony as to his subjective symptoms. *Perminter v. Heckler*, 765 F.2d 870,  
17 872 (9th Cir. 1985).

18 There is very little else in the decision discussing Plaintiff's credibility,  
19 however, insofar as it concerns Plaintiff's testimony concerning his fatigue. The  
20 Administrative Law Judge did discuss Plaintiff's activities of daily living [AR 29], but he  
21 did so in an unfair way, and in a way that does not pertain to Plaintiff's fatigue. The  
22 Administrative Law Judge said that Plaintiff's activities of daily living were inconsistent  
23 with allegations of "totally debilitating symptomatology," [AR 29], but this is a straw man  
24 because Plaintiff did not assert "totally debilitating symptomatology." Especially as to his  
25 sleep apnea-induced fatigue, Plaintiff did not say that he could do *nothing*, but rather that  
26 he fell asleep from time to time, sometimes at the dinner table or in a fast food line [AR  
27 50], sometimes in a meeting [AR 55]. The activities that Plaintiff *was* able to perform, such  
28 as some light cleaning or occasional shopping, did not belie these assertions of impairing

1 fatigue. Indeed evidence of one of the activities that the Administrative Law Judge  
2 referenced was that Plaintiff took his nine-year old daughter to school “if he can be woken  
3 up.” [AR 29]

4 The Administrative Law Judge also said that the record indicates that Plaintiff  
5 had exaggerated his symptoms and limitations [AR 29], but he specified no such  
6 exaggerations, and certainly not as to Plaintiff’s assertions of fatigue. The Administrative  
7 Law Judge said that Plaintiff had been evasive or vague when testifying [*id.*], but gave no  
8 instances of such evasiveness or vagueness. The Administrative Law Judge said that “the  
9 paucity of medical evidence” suggests that Plaintiff was not seeking or receiving treatment  
10 for his impairments [AR 30] but, as to his sleep apnea, that was not true, as Plaintiff sought  
11 treatment from specialists [AR 442-43], and explained how his hiatal hernial and  
12 esophagitis made it dangerous for him to use a CPAP mask that otherwise might have  
13 alleviated the symptoms from his sleep apnea. [AR 48] Finally, the Administrative Law  
14 Judge said that his adverse credibility finding was based on “the claimant’s generally  
15 unpersuasive appearance and demeanor while testifying at the hearing.” [AR30] Again,  
16 without some specificity, it is hard to conclude that this is even *part* of a clear and  
17 convincing explanation of why Plaintiff was not to be believed.

18 The Administrative Law Judge therefore did not follow the law as set forth  
19 in *Bunnell* and *Smolen*. While he erred in disregarding Plaintiff’s testimony about his  
20 fatigue, however, the remedy for the error is less certain. The record contains little  
21 evidence as to the extent to which the fatigue in fact might inhibit Plaintiff from working.  
22 The Administrative Law Judge gave what he called controlling weight to “the medical  
23 opinions and conclusions” of treating physicians Drs. Phan and Tantamjarik. [AR 31] The  
24 Administrative Law Judge did not mention any specific opinion of those doctors that was  
25 controlling, but Dr. Tantamjarik did refer Plaintiff for a nocturnal polysomnogram, and the  
26 physician who prepared the report for Dr. Tantamjarik noted, among other things, the  
27 severe nature of Plaintiff’s sleep apnea and the attendant daytime sleepiness . [AR 442-43]  
28 None of those doctors, however, gave an opinion of Plaintiff’s residual functional capacity.

1        The Administrative Law Judge also gave “substantial weight” to the opinion  
2 of examining physician Dr. Godes [AR 31], and “great weight” to the testimony of the non-  
3 examining medical expert Dr. Nafoosi. [AR 32] Each of those doctors did suggest a  
4 residual functional capacity. For his part, Dr. Godes described a residual functional  
5 capacity as to Plaintiff’s physical limitations, but not as to Plaintiff’s fatigue. He did  
6 address Plaintiff’s fatigue by saying that Plaintiff’s “limiting problem is the daytime  
7 sleepiness associated with his sleep apnea,” [AR 390], implying that the daytime sleepiness  
8 imposed a restriction of some sort on Plaintiff’s otherwise physical capability.  
9 Acknowledging that his RFC conclusion was based upon his physical examination of  
10 Plaintiff [id.], Dr. Godes’ comment about Plaintiff’s limiting problem must be read as  
11 qualifying the physical residual functional capacity that he otherwise found, but without  
12 indicating, in any quantitative way, the kinds of limitations that were imposed.

13       Dr. Nafoosi did not mention anything about Plaintiff’s sleepiness when  
14 establishing a residual functional capacity. On cross-examination, he did appear to accept  
15 that an inability to repair the hiatal hernia might have an impact on Plaintiff’s ability to  
16 function, but he stated that he did not see such a restriction in the file. [AR 21] For his  
17 part, the Administrative Law Judge acknowledged Plaintiff’s statement that he could not  
18 have surgery to repair the hernia, but the Administrative Law Judge did not state that he  
19 disbelieved this statement. [AR 28]

20       The Administrative Law Judge’s reliance on Dr. Godes and Dr. Nafoosi to  
21 establish a residual functional capacity was misplaced. Aside from the fact that their  
22 residual functional capacities did not address the impact of Plaintiff’s sleep apnea, the  
23 Administrative Law Judge wrongly relied on them as “specialist[s] in evaluating  
24 impairments.” [AR 31 (Godes), 32 (Nafoosi)] The regulations do provide that the  
25 Commissioner will give more weight to the opinion of a specialist related to his or her area  
26 of specialty than to a non-specialist, 20 C.F.R. § 404.1527(d)(5). Dr. Godes, however, lists  
27 himself as a “Board Certified Internist,” [AR 390], and Dr. Nafoosi likewise testified that  
28 he is a doctor in internal medicine. [AR 58] Neither presented any evidence of

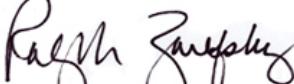
1 specialization in sleep disorders. There is no medical specialty of “evaluating  
2 impairments;” that is akin to saying a doctor is a specialist in being a doctor.

3 The record therefore contains insufficient evidence from which the impact of  
4 Plaintiff’s impairment of sleep apnea, and resulting fatigue, can be evaluated. The  
5 Administrative Law Judge, of course, can re-contact Plaintiff’s physician to obtain further  
6 information, or purchase a consultation with a physician whose expertise includes the  
7 evaluation of sleep apnea and the impact of Plaintiff’s gastrointestinal disorder, 20 C.F.R.  
8 §§ 404.1512(e) and (f), or perhaps take other approaches. On the present state of the  
9 record, however, there is not substantial evidence to support the determination that Plaintiff  
10 is not disabled.

11 In accordance with the foregoing, the decision is reversed, and the matter is  
12 remanded to the Commissioner for further proceedings consistent with this memorandum  
13 opinion.

14 IT IS SO ORDERED.

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16 DATED: September 24, 2013

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20 RALPH ZAREFSKY  
21 UNITED STATES MAGISTRATE JUDGE  
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